

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Petition of Blue Casa Communications, Inc. for)	WC Docket No. 09-8
Declaratory Ruling Concerning Inter-carrier)	
Compensation for ISP-Bound VNXX Traffic)	
)	

Opposition to Petition for Declaratory Ruling of Blue Casa Communications, Inc.

M5 Networks, Inc., NuVox and One Communications Corp. (collectively “Group Commenters”) file these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice establishing a pleading cycle for the Petition of Blue Casa Communications, Inc. (“Blue Casa”) for Declaratory Ruling Concerning Inter-carrier Compensation for ISP-Bound VNXX Traffic.¹ In that Public Notice, the Commission sought comment regarding Blue Casa’s contentions that traffic delivered to Internet Service Providers (“ISP”) via virtual NXX (“VNXX”) is subject to originating interstate access charges and that such traffic is “carved-out” of the FCC’s reciprocal compensation regime.²

Group Commenters oppose Blue Casa’s Petition³ on the grounds that the imposition of access charges based solely upon the network configuration of the terminating carrier contradicts both the FCC’s rules and long-standing industry practices. Specifically, calls

¹ Public Notice, Pleading Cycle Established for Petition of Blue Casa Communications, Inc. for Declaratory Ruling Concerning Inter-carrier Compensation for ISP-Bound VNXX Traffic, DA 09-467 (Feb. 25, 2009) (“Public Notice”).

² *Id.*

³ *Petition for Declaratory Ruling That, Pursuant to the Carve-Out Provisions of 47 U.S.C. § 251(g), Interstate Originating Switched Access Charges, Not Reciprocal Compensation Charges, Apply to ISP-Bound Calls That are Terminated via VNXX-type Foreign Exchange Arrangements*, WC Docket No. 09-8 (filed Dec. 18, 2008) (“Petition”).

cannot be classified based solely upon whether they are terminated to a foreign exchange-type (“FX-type”) arrangement or not. The provision of FX-type services is permitted by the FCC’s rules and policies, and the Commission is considering the proper intercarrier compensation for ISP-bound traffic as part of a larger proceeding. Therefore, grant of Blue Casa’s Petition would be inappropriate.

I. THE APPLICABILITY OF ACCESS CHARGES IS NOT BASED SOLELY ON THE NETWORK CONFIGURATION OF THE TERMINATING CARRIER

In its Petition, Blue Casa seeks a ruling that access charges be imposed on an entire category of traffic: traffic destined for ISPs and completed via foreign exchange arrangements. Blue Casa claims that the use of an FX-type arrangement necessarily justifies the imposition of access charges.⁴ This position contradicts both the FCC’s rules and long-standing industry practices.

Foreign exchange traffic, including so-called virtual FX or VNXX traffic, has traditionally been rated as toll or non-toll based upon a comparison of the local exchanges with which the dialing and dialed numbers are associated. Specifically, if both numbers are associated with rate centers located within the same local calling area (as defined by the calling party’s carrier), the calling party’s carrier does not impose a toll charge on the calling party. If the numbers are associated with rate centers located within different local calling areas (as defined by the calling party’s carrier), the calling party’s carrier imposes a toll charge on the calling party. Consequently, from the calling party’s perspective, there is absolutely no difference between calls to telephone numbers associated with FX-type arrangements and any other telephone numbers: the calling party knows immediately whether it will incur a toll charge

⁴ Petition at 2.

or not based upon the number being called, regardless of whether that number is associated with an FX-type arrangement or not.

Likewise, from the calling party carrier's perspective, there is absolutely no difference between calls to telephone numbers associated with FX-type arrangements and any other telephone numbers. Each telephone number is associated with a specific rate center, and each rate center is located within a specific local access and transport area ("LATA"). Each telephone number is also associated with a specific carrier.⁵ Under the Telecommunications Act of 1996, (the "Act") and the FCC's rules, competitive local exchange carriers ("CLECs") have the right to interconnect with the ILEC at a single point of interconnection ("POI") in each LATA.⁶ Accordingly, all traffic originating in a given LATA to be exchanged between the incumbent local exchange carrier ("ILEC") and a CLEC is exchanged at the POI for that LATA, and each carrier bears the financial responsibility for delivering its own originating traffic to the POI. Once a carrier has delivered its own originated traffic to the POI, however, the other carrier takes complete responsibility for terminating that traffic.

Moreover, once a carrier has delivered its own originated traffic to the POI, it has no practical means for systematically determining the physical termination point of the traffic, or

⁵ For the sake of simplicity, this explanation assumes that the number has not been ported to another carrier, and thus that no local number portability dip is necessary.

⁶ See 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a)(2). See also *Petition of WorldCom, Inc.*, 17 FCC Rcd 27039, 27064, ¶52 (2002), citing *Developing a Unified Inter-carrier Compensation Regime*, 16 FCC Rcd 9610, 9634, 9650, ¶¶ 72, 112 (2001); *In re Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services*, 15 FCC Rcd 18354, 18390, ¶78, n.174. ("SWBT Texas 271 Order") In fact, the Commission lacks the authority to impose a reciprocal duty on CLECs with respect to interconnection obligations unless: (1) CLECs "occupy a position in the market for telephone exchange service within an area that is comparable to the position occupied" by the ILEC; (2) CLECs have "substantially replaced" ILECs; and (3) imposing a reciprocal obligation on CLECs is consistent with the public interest and the purposes of Section 251. 47 U.S.C. § 251(h)(2). The Commission has not, and indeed could not, find that these conditions have been met.

the means by which the traffic is terminated: From the calling party carrier's perspective, all traffic destined for exchange with a particular carrier within a LATA is identical, regardless of whether the traffic is terminated by the terminating carrier to an FX-type arrangement or not. Only the terminating carrier knows the physical location to which, as well as the means by which, a particular call is terminated, including whether the call is terminated via an FX-type arrangement. Consequently, it is not surprising that all calls to an FX-arrangement using a telephone number from the same local calling area, including so-called virtual FX traffic, have traditionally been non-toll traffic since it is the calling party's carrier – not the called party's carrier – that determines whether a call is toll or not by comparing the dialed and dialing telephone numbers.⁷

Further, neither the Act nor the Commission's rules classify traffic on the basis of whether it is routed to a telephone number associated with an FX-type arrangement or not. Rather, traffic is classified on the basis of whether it involves "telephone toll service," which is determined by the calling party's carrier,⁸ or information access.⁹ By definition, calls to an FX-

⁷ See, e.g., *Application by Verizon Maryland Inc.*, 18 FCC Rcd 5212, ¶ 149 n.595 (2003) ("Traditional FX service . . . occurs when the ILEC connects the subscribing customer . . . to the end office switch in the distant rate center from which the subscriber wishes callers to be able to reach him *without incurring the toll charges*") (emphasis added); *Petition for Declaratory Ruling that Tariffs Filed With a State Public Utility Commission Cannot Impose Surcharges on Interstate Private Line Subscribers for Exchange Access*, 88 F.C.C.2d 934, ¶3 (1981) ("Foreign exchange (FX) service normally enables a subscriber to place calls to telephones in a 'foreign' (i.e., distant) exchange without paying [ordinary long distance toll service] charges, and enables persons in the foreign exchange area to place calls to the FX subscriber by dialing a local number without paying [ordinary long distance toll service] charges or using operator assistance to make a collect call").

⁸ With respect to toll free services, the called party agrees that all calls to a given toll free number will be treated as if they were a telephone toll service or blocked. The calling party knows that the called party has agreed to treat the call as a telephone toll service due to the use of the toll free number.

⁹ Rule 51.701(b)(1) provides that the exchange of "telecommunications traffic" is subject to reciprocal compensation, except when the "telecommunications traffic" is "interstate or intrastate exchange access, information access or exchange service for such access."

arrangement using a telephone number from the same local calling area does not involve “telephone toll service,” because the entire point of an FX-type arrangement is to permit calling parties from the same local calling area to call the FX-type arrangement without incurring toll charges. The calling party’s carrier does not impose a separate toll charge for calls to telephone numbers associated with rate centers located within the same local calling area as the calling party’s telephone number. Indeed, any attempt by the calling party’s carrier to impose toll charges for calls to some telephone numbers associated with a given rate center but not for calls to other telephone numbers associated with the same rate center would amount to unjust and unreasonable discrimination in violation of Section 202(a) of the Act.¹⁰ As such, traffic that meets the definition of “telecommunications traffic” and is subject to reciprocal compensation pursuant to Section 251(b)(5)¹¹ remains telecommunications traffic subject to reciprocal compensation whether it is routed to a telephone number associated with an FX-type arrangement or not.

Maintenance of the standard industry practice of rating calls to FX-type arrangements based on a comparison of the NPA-NXXs of the calling and called party’s numbers is appropriate because so-called virtual FX traffic is indistinguishable from other types of local traffic in the manner in which it is billed to the calling party or handled by the calling party’s carrier (*i.e.*, the calling party’s carrier incurs no additional costs). The use of an FX-type arrangement, whether by an ILEC or a CLEC, has no effect on the costs that originating carriers

47 C.F.R. §51.701(b)(1). The Act defines “exchange access” as “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” 47 U.S.C. §153(16). The Act in turn defines “telephone toll service” as “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.” 47 U.S.C. §153(48).

¹⁰ 47 U.S.C. § 202(a).

¹¹ 47 U.S.C. § 251(b)(5).

incur when their customers call numbers associated with that FX-type arrangement. This is always the case because the distance that an originating carrier must transport any given call is determined by the location of the originating carrier's own customer and the location of the POI, not by the service configuration of the terminating carrier. The respective locations of the POI and the terminating and originating carriers do not change based on the number that the called party has opted to use, and both carriers use the same switches, transport facilities, routing tables and interconnection points to complete the call. Accordingly, the network configuration of both the originating and terminating carriers, and thus the transport costs that the originating carrier incurs, does not vary based on whether the number that the called party has opted to use is associated with the rate center within which the party is located.

Carriers incur the same costs to provide originating service to their customers when they call numbers from virtual NXX codes as they incur when they call numbers from any other NXX code. It also is important to note that carriers face the same transport burdens for calls to each other's FX customers. Moreover, claims that intraLATA calls to FX-type arrangements are identical to toll services apart from the telephone number assigned to the called party are nonsensical. These types of claims are based on the assertion that these calls continue to meet the Act's definition of "toll telephone service,"¹² and thus the definition of "exchange access"¹³ because one party to the call pays "a separate charge" above and beyond the charges that are imposed on the calling and called party for service within the local calling area. This argument is inconsistent with industry practice and the plain meaning of the Act because it

¹² The Act defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. §153(48).

¹³ The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §153(16).

would permit the called party's carrier to determine whether any given call is a "toll telephone service" by whether that carrier chooses to impose a "separate charge" for the call on the called party. Under this interpretation of the Act, calls would be classified as toll telephone service based upon the pricing plan of the called party's carrier, and the calling party's carrier would have no means for knowing whether any given call would involve a toll telephone service. This is not only fundamentally inconsistent with historical industry practice, it would also be infeasible as a practical matter.

In reality, the calling party's carrier has the sole right to define its local calling areas and establish pricing plans for its customers,¹⁴ and thus only the calling party's carrier has the right to determine whether a particular call involves a toll telephone service. The pricing plan of the called party's carrier is irrelevant to this determination. Accordingly, the calling party knows immediately upon dialing any given number whether he or she will be incurring separate toll charges for that call, and thus whether he or she will be using a "telephone toll service" as defined in the Act. Telecommunications traffic subject to reciprocal compensation or "local calls" are exchanged between the originating carrier and terminating carrier at the POI agreed to by the carriers for the given LATA, and the originating carrier pays reciprocal compensation to the terminating carrier. The calling party pays no separate charge for placing such a call. By contrast, "telephone toll service" calls are delivered from the originating carrier to an interexchange carrier, which then delivers the call to the terminating carrier, and the originating carrier collects originating access charges while the terminating carrier collects terminating access charges. The calling party typically pays a separate charge for placing such a

¹⁴ Although state regulatory authorities typically require ILECs to seek approval for changes to their local calling areas and pricing plans, it is still the ILEC, rather than any other carrier, that determines the local calling area for its own customers.

call. As explained above, calls to FX-type arrangements are identical to any other type of local call (*i.e.*, telecommunications traffic subject to reciprocal compensation) from the perspective of the calling party and calling party's carrier, and there is no reason to depart from traditional industry practice or the definitions in the Act and the Commission's rules simply to impose originating access charges on such calls.

II. THE PROVISION OF VNXX SERVICE IS A VALID AND LEGAL USE OF NUMBERING RESOURCES

FX-type arrangements are widely used throughout the telecommunications industry. As long as carriers continue to abide by the Commission's policies and orders and industry standards regarding the use of numbering resources, there is no basis for treating telephone numbers associated with FX-type arrangements any differently than any other telephone numbers as Blue Casa requests.

The FCC has consistently acknowledged the industry practice of providing FX-type services and has recognized the legitimacy of such services.¹⁵ Although the FCC has not explicitly recognized the legitimacy of Virtual FX services such as VNXX, it has ruled on related issues in ways that confirm the legitimacy of VNXX services. For example, in the *Verizon Virginia Arbitration Order*, the Commission responded to several Petitioners' requests that Verizon be required to utilize the traditional call rating method to determine the compensation

¹⁵ See, e.g., *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 446, ¶71 (1998) (recognizing legality of FX services).

due for the Petitioners' virtual FX services.¹⁶ The Commission ruled that the Petitioners' proposed language should be adopted¹⁷ - an implicit recognition of the validity of the Petitioners' virtual FX services. Similarly, the Commission has sought comment, in its *Telephone Number Portability* proceeding, on whether "wireline carriers may serve customers with numbers ported from wireless carriers on a Foreign Exchange (FX) or Virtual FX basis."¹⁸ Again, this strongly suggests that the Commission recognizes Virtual FX services as lawful service offerings.

¹⁶ See, *In re Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; In the Matter of Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration; In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.*, 17 FCC Rcd 27039, ¶¶ 286-303 (2002).

¹⁷ *Id.* ¶ 288.

¹⁸ *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, 18 FCC Rcd 23697, ¶ 12 (2003).

III. CONCLUSION

For the foregoing reasons, M5 Networks, Inc., NuVox and One Communications Corp. urge the Commission to reject Blue Casa's request for Declaratory ruling that ISP-bound traffic terminated via FX-type arrangements is subject to originating interstate switched access charges.

Respectfully Submitted,

By:

A handwritten signature in cursive script, appearing to read "Denise N. Smith", written over a horizontal line.

Todd D. Daubert
Randall W. Sifers
Denise N. Smith
KELLEY DRYE & WARREN LLP
WASHINGTON HARBOUR
3050 K STREET, NW, SUITE 400
WASHINGTON, DC 20007
202-342-8400 (PHONE)
202-342-8451 (FACSIMILE)

*Counsel to M5 Networks, Inc., NuVox and One
Communications Corp.*